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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For a Construction Permit for a New)	
FM Station on Channel 247A in)	
Homewood, Alabama)	
)	
TO: The Full Commission		

FURTHER PETITION FOR RECONSIDERATION

Heidi Damsky ("Damsky"), by her attorney, hereby respectfully requests the full Commission to reconsider and set aside its Order, released in this proceeding on August 25, 1998, which affirmed earlier rulings denying the application of Heidi Damsky for a construction permit for a new FM broadcast station at Homewood, Alabama, and to issue an order declaring that the winner of the Homewood comparative proceeding will be selected by competitive bidding and that Damsky is qualified to participate in such bidding. In support thereof, it is alleged:

1. By Order, released in this proceeding on August 25, 1998, the Commission affirmed earlier rulings which denied Damsky's application for a new FM broadcast station at

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Homewood, Alabama, and granted an application by Homewood Radio Co., L.L.C. ("HRC"), a company owned, jointly, by two other applicants for the facility, WEDA, Ltd. ("WEDA") and Homewood Partners, Inc. ("HPI"). Damsky has filed a timely notice of appeal from the Commission's Order in the United States Court of Appeals for the District of Columbia Circuit.

2. While Damsky's initial Petition for Reconsideration was pending, however, the Commission released its First Report and Order in MM Docket No. 97-234, Implementation of Section 309(j) of the Communications Act, released August 18, 1998, and published September 11, 1998, at 63 FR 48615. There, the Commission decided that all pending comparative cases will be decided by a system of competitive bidding; there will be no exceptions. Furthermore, at paragraph 89, the Commission made the following statement:

"At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (*e.g.*, when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction. Among those remaining in the proceeding, we will permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant. This serves the public interest by not delaying the selection of an auction winner to resolve potentially irrelevant issues. It also comports with Section 309(j)(5) of the Communications Act authorizing the prescription of expedited procedures for the resolution of any issues pertaining to the winning bidder's basic qualifications. It is more efficient to decide basic qualifying issues only against the winning applicant." (Footnotes omitted.)

Here, Damsky had a timely filed administrative review pending before the Commission at the time when the First Report and Order was released. Later, she timely filed for judicial review. Therefore,

she is not in the category of applicants who are disqualified from participating in the auction. To the contrary, she is clearly qualified to participate in the government auction for the Homewood construction permit, and that the Commission's actions, purporting to deny her application, must be set aside in order to allow her to so participate.

3. Furthermore, although Damsky was deemed financially unqualified to receive a construction permit, the Commission has now made it plain that, so long as she is the successful bidder, she will not be required to demonstrate that she is financially qualified. The mere ability to pay for the construction permit is now to be considered conclusive evidence of the financial qualifications of the winning bidder. First Report, at paragraph 99.

4. One questions which is not resolved by paragraph 89 of the First Report and Order is the question of who may bid at the auction. Paragraph 89 seems to suggest that, where there is a comparative case and the decision has not become final, either because of administrative or judicial review, all of the applicants, including those whose applications have been denied, may participate in the bidding. It is clear, therefore, that Damsky may not be excluded from the bidding, just because her application has been denied. HPI, however, and WEDA, have merged into a single applicant and that merger has been approved by the Commission. A question arises, therefore, as to whether HPI and WEDA may participate individually as bidders or whether they must bid through the merged entity (HRC). At this point in time, Damsky takes no position with respect to that matter.

5. Damsky recognizes that she has an appeal on file with the Court of Appeals, which she may not properly maintain so long as she is seeking further reconsideration from the full Commission. Damsky will, therefore, ask the Court to dismiss her appeal, without prejudice to

refiling, in the event that the Commission does not grant this Further Petition for Reconsideration. Damsky believes, however, that the Commission must grant the relief requested herein, since that relief is specifically mandated by the Commission's First Report and Order.

6. In requesting the relief sought in this Further Petition, Damsky by no means concedes that the Commission was correct in denying her application because she was, allegedly, financially unqualified. It would appear that the Commission has now eliminated financial qualifications as a pre-requisite to participate in competitive bidding. Therefore, if the Commission grants the relief requested in this Further Petition, the issue of Damsky's financial qualifications becomes moot.

7. Nonetheless, Damsky continues to assert that she was financially qualified and remains financially qualified. Damsky believes that she has already fully preserved her exceptions to the erroneous rulings of the ALJ and Commission, which resulted in her financial disqualification. Nevertheless, out of an excess of caution, Damsky is attaching hereto a full statement of the reasons why she should have been found financially qualified.

Respectfully submitted,

HEIDI DAMSKY

September 18, 1998

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By: 

Lauren A. Colby
Her Attorney

REASONS WHY DAMSKY SHOULD HAVE BEEN FINANCIALLY QUALIFIED

In 1992, ALJ Joseph Chachkin released an Initial Decision, ruling that Damsky was not financially qualified to be a Commission licensee. ALJ Chachkin did not question Damsky's character; he had previously rejected a request that he add a false financial representation issue against Damsky. He merely found that Damsky had not crossed all of the required "t's" and dotted all of the required "i's" to establish her financial qualifications. Heidi Damsky, 7 FCC Rcd 5244 (1992).

On September 17, 1992, Damsky filed Exceptions to the Initial Decision; Exceptions which were originally directed to the Review Board but, the Board having been abolished in the interim, were eventually ruled upon by the full Commission in its Memorandum Opinion and Order, released May 6, 1998, and published at 1998 WL 219837, 12 Pike & Fischer RR 140.

Damsky's Exceptions were predicated, squarely, on the ALJ's failure to comply with the standards set forth in the famous case of Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075 (1990), aff'd sub. nom., Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). On September 12, 1997, however, WEDA and HPI filed a Joint Request for Approval of Settlement Agreement between them. In that Joint Request, WEDA and HPI made a new attack on Damsky's financial qualifications, making new arguments and pointedly avoiding the applicability of Northampton to Damsky's situation. In an Opposition, Damsky protested, asserting that she had a right to have her case evaluated on the basis of her timely filed Exceptions. In a Reply, however, HPI and WEDA suggested, in substance, that it wasn't really necessary for the Commission to go to all that trouble, since as they observed, "the Joint Parties were careful in the Joint Request to point to the record of the proceedings repeatedly, ensuring accuracy and an easy read for the Commission".¹ As it turned out, the Commission evidently chose to adopt the "easy read" approach, because the Commission utterly failed to address the applicability of Northampton to this proceeding.

As Damsky pointed out in her Exceptions, the findings of the ALJ with respect to Damsky's financial qualifications were fundamentally flawed, because the ALJ refused evidence which would have allowed Damsky to demonstrate that (a) she was qualified on the day when the application was filed; and (b) that she remains qualified today. The evidence showed that prior to filing her application, Damsky was told by her consulting engineer, William E. Bennis, III, that she would need approximately \$275,000 to \$300,000 to construct and operate her proposed station for three months with no revenues of any kind (Hear. Tr. 269, 1129). In point of fact, in August of 1988, when the application was filed, the balance sheet of Damsky's husband, Martin Damsky, showed that he had more than \$300,000 in cash and liquid assets (Hear. Tr. 1111). These included \$16,500 cash

¹Reply to Consolidated Responses to Joint Request for Approval of Settlement Agreement, filed October 1, 1997, at p. 9.

on hand; \$103,000 in listed securities²; \$140,000 in Damsky Paper Co. stock; and \$100,000 in cash in the company's profit sharing plan (F. 9; Damsky Ex. 10, pg. 3; Hear. Tr. 1094, 1110-11). The balance sheet also showed further that Mr. Damsky had no significant current liabilities (F. 8; Damsky Ex. 10, pg. 3). As Mr. Damsky testified, the monies shown as Damsky Paper Co. stock actually constituted his share of the retained earnings of the company, which were in the bank and available to him at any time (Hear. Tr. 1111-14). At the time Damsky's application was filed, Mr. Damsky owned 20% of Damsky Paper Co.; at the time of the hearing, Mr. Damsky testified that he owned 100% of Damsky Paper Co., and that the company was estimated to gross over \$18 million in 1991 (Hear. Tr. 1097, 1105-06).

Damsky asked her husband if this was something they could afford, and Mr. Damsky assured her that they could come up with the necessary funds and further advised his wife at that time that he would support her in whatever manner might be required in order to provide the funds needed to construct and operate the station (F. 9; Hear. Tr. 271, 1109-11).

The ALJ received Damsky Exhibit 10, except for pages 2, partially page 4 and page 5. Page 2 showed the exact costs to construct and operate the station. Rejection of this page to Exhibit 10 was error. Page 5 was a letter of credit, issued to Heidi Damsky by First Alabama Bank on June 20, 1991, showing that on the date of the letter the bank was willing to loan Damsky the sum of \$300,000, and that such a loan would also have been available to her in 1988. The rejection of page 5 of Exhibit 10 was also error.

Nevertheless, the evidence received at hearing showed that Damsky anticipated a need for \$300,000, and that she and her husband together had well over that amount in cash and liquid assets. The ALJ found that no cost estimates had been submitted. That was not really true. An itemization was submitted as Damsky Exhibit 10, pg. 2, but was rejected by the ALJ (Hear. Tr. 1172-73). While Damsky's estimate of her costs was not received in evidence, it should be noted that the cost figures were circulated as part of Damsky Exhibit 10 (F. 10); that the other parties to the proceeding had a full opportunity to request the consultant who prepared the estimate to appear and be cross-examined, but that no party made such a request and no evidence was introduced challenging the adequacy of the cost estimates (Hear. Tr. 1123-24).

A balance sheet was introduced as Damsky Exhibit 10, pg. 4, but was partially rejected (Hear. Tr. 1172-73). Damsky's credit letter was also rejected (Hear. Tr. 1172-73). These rulings were clearly erroneous. They crippled Damsky's efforts to establish her financial qualifications. Similarly, the ALJ erred in suggesting that, because Martin Damsky is liable on certain debts of the Damsky Paper Co., those indebtednesses should somehow be subtracted from the Damskys' liquid assets. Obviously, any bank or creditor would look first to the Damsky Paper Co. for repayment of any such loans, and only secondarily to Martin Damsky. Similarly, the ALJ erred in suggesting that Martin Damsky could not use certain of his liquid assets because of tax

² At hearing Mr. Damsky identified these securities as First Alabama Bank and Big B Drugs (Hear. Tr. 1090).

consequences. The standard established by the FCC to establish the financial qualifications of an applicant is the ability to construct and operate for three months with no revenues of any kind. When retirement accounts are used for the construction of a radio station, the tax bills do not normally have to be paid for many, many months after the expiration of the initial three month operating period and should not, therefore, be deducted from an individual's assets. The ALJ erred when he found that Mr. Damsky had not expressed a willingness to withdraw his pension funds if necessary in order to provide funds for the construction and operation of the station. Mr. Damsky's testimony showed that he was 100% behind his wife and would have done whatever was necessary. However, as the bank letter demonstrates, he really did not need to rely on his liquid assets, because he had the requisite borrowing power at the bank (Hear. Tr. 1111-13).

The most egregious error committed by the ALJ was the exclusion of the bank letter, issued to Damsky by First Alabama Bank. That letter clearly complied with current Commission requirements. Scioto Broadcasters, 5 FCC Rcd 5158 (Rev. Bd. 1990). However, the ALJ refused to receive the letter in evidence (Hear. Tr. 1171-72). Damsky cannot understand the disparity of treatment meted out to her by the ALJ as opposed to the ALJ's exceedingly lenient treatment of HPI (Homewood Partners, Inc.).³

In Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075 (1990), aff'd sub nom. Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991), the Commission dealt specifically with the situation presented here, where an applicant filed on the "old" Form 301, which did not require an applicant to include in the application either an estimate of costs or showing of sources of funds to meet those costs. In Northampton, the Commission said the following at ¶14:

"Nevertheless, as the Commission explained in Certification of Financial Qualifications, 2 FCC Rcd at 2122, the certification procedure was designed to 'spare[] [applicants] the time and effort necessary to prepare and submit the documentation previously required to demonstrate their qualifications.' (emphasis added). In this manner, the certification procedure was intended to 'provide[] significant benefits both to applicants and to the Commission.' Id. Cf. Metromedia Radio & TV, 102 FCC 2d 1334, 1350-52 ¶¶ 30-32 (1985) (usual practice is not to require the assignee, who certified its financial qualifications, to produce the detailed documentation that would have been required prior to 1981). Thus, we conclude that, under the 1981 requirements governing certification cases like the one before us, reasonable assurance does not necessarily require that an applicant have the written documentation (which would have been required before the 1981 revision of FCC Form 301) when it certifies

³The ALJ allowed HPI to amend its application to substitute a corporation for a partnership, allegedly to enable HPI to establish its financial qualifications.

its financial qualifications. Although the supporting documentation must be produced upon the Commission's request, the applicant may prepare and submit it after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification." 4 FCC Rcd at 5519.

Thus, the rule would appear to be that an applicant may prepare and submit documentation supporting its certification at a time subsequent to certification, provided that the applicant actually had a reasonable assurance of available funds at the time of certification.

That is exactly the case here. Damsky knew from her consulting engineer that she needed up to \$300,000 to construct a station and operate it for three months with no revenues of any kind.⁴ That is a far more generous and conservative estimate than was involved in the Northampton case. There, the applicant, Cutter, was proposing to construct and operate the entire station for a total cost of only \$38,836. See, Northampton at ¶5. In any event, the Damskys actually had cash or cash equivalent well in excess of \$300,000. Thus, it would appear that Damsky clearly falls within the scope of an applicant who, under Northampton, "may prepare and submit [documentation] after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification".

Upon reconsideration, in Northampton, the Commission's Mass Media Bureau sought to limit the case to those situations, e.g., Damsky's, where an applicant was relying upon a balance sheet. The full Commission, however, declined any such limitation, and made it clear that applicants, e.g., Damsky, could also document other financing, e.g., bank loans, even though the documentation was not available at the time of filing of the original application. It said:

"The Mass Media Bureau has also filed a petition for reconsideration of that aspect of our decision which held that the certification procedure does not require applicants to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications. In its petition, the Bureau urges us to modify that holding so as to limit its application to applicants, such

⁴ HPI argued at fnnt. 12 to its reply findings that, because William E. Bennis, III was not presented for testimony, the figure which he gave to Damsky was suspect, citing United Broadcasting Corp., 53 RR 2d 57 (1983). HPI forgot that in Damsky Exhibit 10, pg. 2, a complete itemization of the costs comprising the figure was set forth and that it was known from prior testimony that Damsky got her figures from Mr. Bennis. Thus, if any party had wanted to cross-examine Mr. Bennis, they could have requested him to appear and Damsky would have been obliged to make him available (F. 11; Tr. 1123-24). However, no party made such a request for the obvious reason that the figures supplied were reasonable and consistent with the estimates of the other two applicants in the proceeding, i.e., WEDA and Partners.

as Cutter, who rely solely on the personal resources of their principals. All other applicants, the Bureau submits, should be required to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications.

Although the Bureau contends that the public interest would be best served by granting reconsideration, its has provided no basis for the disparate treatment of applicants that it purposes and we find none ourselves. Nor does the Bureau show why the evidentiary submissions demonstrating that the applicant was financially qualified at the time its application was filed, as specified by our decision herein, are insufficient to meet the requirements of the certification procedure. More importantly, given the previous clear indications that an applicant need not prepare the documentation contemplated by the certification procedure requirements until requested to do so, 4 FCC Rcd at 5518 para. 14, we believe that there is no valid basis for such an approach. In view of the foregoing, we will deny the Bureau's petition." 5 FCC Rcd 3075 at paras. 6-7.

Thus, Damsky's bank letter was also clearly admissible under Northampton, so long as the bank financing was available at the time her application was filed – a fact confirmed by the bank letter, itself (see letter, copy attached and marked Exhibit A).

EXHIBIT A

June 20, 1991

R. A. Montgomery, Jr.
Senior Vice President

Mrs. Heidi Damsky
3508 Mill Run Road
Mountain Brook, Al 35223

Dear Mrs. Damsky,

I understand that you are applying to the FCC for a construction permit for a new FM broadcast station to be situated in Homewood, Alabama, and that you may require a loan of up to \$300,000.00 for use in connection with the construction and initial operation of the proposed station.

My initial review indicates you do qualify for a loan of \$300,000.00 secured by the signatures of you and your husband, Martin, and by a second mortgage on your residence. Furthermore, the loan would be secured by a pledge of the stock which you and your husband own in Damsky Paper Company. The loan would bear interest at the rate of First Alabama Bank Base plus 1% and repayable in sixty equal monthly installments of principal and interest.

I understand that you do not require a binding commitment and this letter is not a binding commitment. It will, however, provide you with reasonable assurance of the availability of those funds. The availability of the loan will depend upon a review of your financial statement and that of your husband at the time when the funds are actually requested.

Our bank has had a financial statement on hand for Martin Damsky, for a period of years and we had such a statement on file as of June 1, 1988. I have reviewed that statement, as well as the current statement and I hereby advise you that, as of June, 1988, our bank would have written you a letter identical to this one.

Sincerely,


R.A. Montgomery, Jr.

RAM/dk

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 21st day of September, 1998, to the offices of the following:

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